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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA

THE BANK OF NOVA SCOTIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CANADIAN BANKERS' ASSOCIATION

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INTRODUCTION

The Canadian Bankers' Association ("CBA") respectfully submits this brief as *amicus curiae* in connection with the Court's consideration of the petition of The Bank of Nova Scotia (the "Bank") for a writ of certiorari.[1] CBA supports the petition and respectfully requests that it be granted.

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1 Petitioner and respondent have consented to the appearance of CBA as an *amicus*, and written consents are on file with this Court. CBA previously appeared as an *amicus* in proceedings below, supporting the Bank before the district court and the United States Court of Appeals for the Eleventh Circuit.

CBA's INTEREST

CBA is a corporation organized in 1900 under a statute enacted by the Parliament of Canada. Its members consist of Canadian banks and Canadian subsidiaries of United States and foreign banks. CBA, among other things, represents the interests of the Canadian banking industry both in Canada and abroad.

Most of CBA's largest members have branches or agencies in the United States and in various other countries who have friendly relations with the United States. It is the policy of these members to conduct business in full compliance with the laws and regulations of all countries in which they do business.

Unlike the United States, some of the countries in which members of CBA do business, such as The Commonwealth of the Bahamas and the Cayman Islands, have stringent financial privacy laws which prohibit a bank from disclosing records relative to a customer's account unless the customer authorizes, or a court of competent jurisdiction in such countries orders, disclosure. Failure to comply with such laws can result in severe criminal sanctions and other substantial penalties including loss of license to engage in the banking business in the country whose law has been violated.

CBA's interest in this matter arises from the fact that branches and agencies of members of CBA located in the United States are frequently served with process, including grand jury subpoenas, trial subpoenas and IRS summonses, demanding production in the United States of records and documents located outside the United States in jurisdictions whose financial privacy laws prohibit such production. It is only happenstance that it was the Bank rather than any one of several other members of CBA which was confronted with the dilemma that arose in the proceedings below.

The decision of the Eleventh Circuit has a direct impact on all members of CBA who do business in the United States and

in other countries which have financial privacy laws backed by criminal and other sanctions. The decision would compel every member of CBA who may find itself in the same situation as the Bank to violate the laws of other friendly nations. It would require such members to incur substantial criminal and civil penalties notwithstanding that the members have made every reasonable effort to comply with the laws of this country and those of the other friendly nations involved.

Accordingly, CBA is deeply concerned about and vitally interested in this matter, the significance and ramifications of which are far-reaching.

ARGUMENT

THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH PRINCIPLES OF LAW INVOLVING BASIC CONCEPTS OF DUE PROCESS AND FAIRNESS AND PRECEPTS OF INTERNATIONAL LAW LAID DOWN BY THIS COURT AND OTHER CIRCUIT COURTS

The basic issue raised by the decision below is whether a neutral non-party witness can be held in civil contempt for failure to produce subpoenaed records when the criminal financial privacy laws and judicial decisions of the country where the subpoenaed records are located prohibit such production without the permission of a court of competent jurisdiction in such country, and the United States government which caused the subpoena to be issued refuses either (i) to provide reasonable assistance to the witness in its efforts to obtain the requisite foreign court approval or (ii) to pursue other effective alternative means available to obtain the subpoenaed records on a government-to-government basis.

In resolving this issue in the affirmative, the Eleventh Circuit has raised questions of federal law which only this Court can and should resolve. These questions have Constitutional dimensions, involving basic concepts of due process and fairness. The decision below also raises issues of international law that require review and resolution by this Court. The schism be-

tween the principles of law enunciated by the Eleventh Circuit and those laid down by this Court in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) [hereinafter cited as *"Rogers"*], and by other Circuits, has created apprehension and uncertainty for all foreign business entities that are doing business both in the United States and in other countries which have strict criminal financial privacy laws. It is a situation which is in need of clarification and amelioration by this Court.

This Court has recognized there are constitutional limits which courts in the United States must observe in determining whether to impose sanctions on parties and witnesses who have made good faith attempts to comply with process requiring production of documents in violation of the laws of a foreign nation. *Rogers*, 357 U.S. 197 (1958). In *Rogers*, *Id.*, this Court held that sanctions may not be imposed on a party who made a good faith attempt to comply with a discovery order requiring violation of foreign law. In so doing, this Court stated:

> It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.

357 U.S. at 211-12

The principles set forth by this Court in *Rogers* are reflected in both Comment c to § 40 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) (hereinafter the "Restatement") and § 420(2) of the *Restatement (Revised) of Foreign Relations Law of the United States* (Tent. Draft 3, 1982) (hereinafter the "Tentative Revised Draft of the Restatement").

Comment c to § 40 provides in pertinent part that:

> In determining whether to refrain from exercising jurisdiction, a state must give special weight to the nature of the penalty that may be imposed by the other state. A state will be less likely to refrain from exercising its

> jurisdiction when the consequence of obedience to its order will be a civil liability abroad. Similarly, a state will be less likely to exercise jurisdiction, where there is a possibility that obedience to its command may put an alien in jeopardy under the criminal laws of its own country, than it will if one of its own nationals may be subjected to foreign liability under similar circumstances.

Similarly, § 420(2) of the Tentative Draft of the Restatement states:

> If disclosure of information located outside the United States is prohibited by a law or regulation of the state in which the information or prospective witness is located, or by the state of nationality of the prospective witness:
>
> . . .
>
> (b) the court may not ordinarily impose the sanction of contempt, dismissal or default on the party that has failed to comply with the order for production, except in cases of deliberate concealment or of removal of information or of failure to make a good faith effort [to secure permission from the foreign authorities to make the information available].

In its decision below, the Eleventh Circuit totally disregarded the principles of *Rogers* and the guidelines set forth in Comment c to § 40 of the Restatement and § 420(2) of the Tentative Revised Draft of the Restatement. The Eleventh Circuit seems to suggest that nothing short of production of the documents in violation of the criminal laws of the Cayman Islands would enable the Bank to avoid contempt sanctions. It gives no weight to the determined efforts of the Bank to obtain judicial approval of production of the subpoenaed documents in conformity with the procedures prescribed by the financial privacy laws of the Cayman Islands. Moreover, adhering to the view that a grand jury, regardless of the circumstances, should be allowed unfettered investigatory powers that reach outside the United States and cross the borders of other friendly

nations, the Eleventh Circuit approved the refusal of the government to provide information to the Bank sufficient to enable it to successfully apply in the Cayman Islands for judicial approval of production of the subpoenaed documents in the United States. The Eleventh Circuit also rejected the proposition that, notwithstanding the complications posed by the financial privacy laws of the Cayman Islands, the government properly insisted on strict compliance with the grand jury subpoena and was not obliged to use a procedure previously agreed to by the Cayman government pursuant to which the subpoenaed documents could be obtained on a government-to-government basis.

In essence, the Eleventh Circuit is committed to the notion that the financial privacy laws of friendly nations which are backed by substantial criminal sanctions are and should be no obstacle to grand jury investigations and constitute no excuse for failing to comply with process or court orders issued in the United States. This notion is in conflict with the views expressed by this Court in *Rogers*, *supra*, to the effect that fear of criminal prosecution constitutes a "weighty excuse" for failure to comply with process or court orders. This notion also is at war with the guidelines reflected in the Restatement and the Tentative Revised Draft of the Restatement. There is pressing need for a reconciliation of these conflicting views which only this Court can provide.

The decision of the Eleventh Circuit also conflicts with decisions of other circuits.

In *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983), the Seventh Circuit reversed the order of the district court which enforced process requiring a bank to produce in the United States documents located in its branch in Athens, Greece, where compliance would subject employees of the bank in Athens to the risk of substantial criminal sanctions under the laws of Greece. The Seventh Circuit deemed it "significant" that the bank's employees would be exposed to criminal sanctions and that the bank and its employees were

involved only as "neutral sources of information." 699 F.2d at 346. Those are factors which the Eleventh Circuit in its decision below effectively deems insignificant.

Similarly, the Eleventh Circuit decision radically parts company and is in conflict with decisions rendered in the Second Circuit, especially with respect to principles of comity and international law, and reflects an unprecedented insensitivity to the concerns of the international business and banking community and the legitimate interests of nations friendly to the United States.

In *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960), the Second Circuit refused to enforce subpoenas served upon New York agencies of several Canadian banks which sought production in New York of bank records maintained at branches of those banks in Canada. In so doing, the Court concluded:

> Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures.

282 F.2d at 152 (citations omitted).

The principles laid down in *Ings*, *supra*, were subsequently reaffirmed in *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962), in which the Second Circuit affirmed an order modifying a federal grand jury subpoena so as not to require the production of records held in a branch of a United States bank in Panama in violation of the laws of Panama. The Second Circuit stated:

> This Government, as well as other litigants, has a real interest in civil and criminal cases in obtaining evidence wherever located. However, we also have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own.

297 F.2d at 613.

These principles, although seemingly not recognized by the Eleventh Circuit, are not unique to the jurisprudence of the United States. The very same tenets of comity and international law are recognized and upheld by other sovereign members of the international community. In *Frischke et al. v. Royal Bank of Canada et al.*, (1978) 17 O.R.(2d) 388 (Ont. C.A.), the Court of Appeals in Ontario, Canada reversed the order of a lower court which directed a Canadian bank and its officers to produce documents from its branch in Panama in violation of the laws of Panama. That court said:

> An Ontario court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that State. We respect those laws. The principle is well recognized.

17 O.R. (2d) at 397.

Cf. *Rio Tinto Zinc Corp. v. Westinghouse Electronic Corp.*, (1978) A.C. 547 (H.L.); *Ralli Bros. v. Compania Naviera Sota Y Aznar*, (1920) 2 K.B. 287, 304 (C.A.).

The conflict between the Eleventh Circuit and other circuits makes it imperative for this Court to establish clear guidelines for neutral witnesses, the government and the courts which (i) assure due process to disinterested witnesses, (ii) respect the legitimate interests of other friendly nations as reflected by their laws and (iii) do not unduly fetter criminal investigations conducted in the United States. Without such guidance, the Bank and members of CBA, who in the future may be confronted with the same Hobson's choice imposed on the Bank, will continue to be placed in jeopardy.[2] Accordingly, there is an acute need for this Court to intervene.

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2 It is noteworthy that, in addition to certain Canadian banks, numerous foreign, non-Canadian banks have agencies located both in Miami, Florida and in countries, such as the Commonwealth of the Bahamas, the Cayman Islands and the Republic of Panama, which have strict financial privacy laws backed by criminal sanctions. All of these banks are subject to process issued in the Eleventh Circuit.

THE FINE IMPOSED IS UNWARRANTED, PUNITIVE IN NATURE AND A DENIAL OF PROCEDURAL DUE PROCESS

Even assuming that the order of civil contempt entered below was proper, the fine imposed upon the Bank in the amount of $1,800,000 is punitive in nature and, in the circumstances, totally inappropriate and unfair.

It is axiomatic that an order of civil contempt is designed to coerce a witness to comply with process. Unlike an order of criminal contempt, it is not intended to mete out punishment. When resistance to process ends and compliance begins, any rationale for continuing to hold a witness in civil contempt and imposing sanctions ceases. *Shillitani v. United States*, 384 U.S. 364 (1966).

The Bank ceased resisting the subpoena when it stopped invoking Cayman law as a ground for not complying with the subpoena and on November 17, 1983 produced all of the Cayman documents falling within the purview of the subpoena. This production was made only three days after the fine against the Bank became effective. Three days earlier the Bank had commenced the production of Bahamian documents. Subsequently, as a result of its efforts to produce all documents as and when located, the Bank on December 5 produced additional Bahamian documents (many of which had been stored in a mislabeled box), and on January 25, 1984 produced carbon copies of Bahamian documents which had been previously furnished to the government. Nonetheless, instead of limiting the daily fine of $25,000 to the period from November 14 to November 17, when the Bank had ceased resisting the subpoena and had produced all Cayman and Bahamian documents known by the Bank at that time to exist, the district court imposed the daily fine of $25,000 from November 14, 1983 (when the fine became effective) to January 25, 1984 (when carbon copies of previously produced documents were submitted to the government).

By any objective standard, the daily fine imposed for the period from November 17 to January 25 constitutes punishment. There is nothing in the record of these proceedings which suggests that the Bank, after it ceased resisting the subpoena on November 17, did anything other than use its best efforts to locate and produce all subpoenaed records. It would appear that the Bank is being punished because of its failure to have an efficient system for storing and locating inactive records and documents and not because it was resisting compliance with the subpoena. This is of grave concern to CBA because it is common knowledge among members of the international banking community that branches and agencies of banks located in such off-shore jurisdictions as the Bahamas and the Cayman Islands do not have the benefit of a document retrieval system supported by a sophisticated computer operation. Most, if not all, branches and agencies of banks in those countries follow the same practice employed by the Bank relative to documents and records that are no longer current. Such materials are placed in cartons which in turn are stored in warehouses. This system is vulnerable to human error such as misplacing of documents and mislabeling of cartons. Retrieval of old documents and records so stored is essentially a manual operation which consumes many man-hours over periods of days and weeks of effort which can become extended when documents are misfiled or cartons mislabeled. Consequently it is manifestly unfair to fine the Bank or any other bank which becomes similarly situated for its inability to retrieve documents with the speed and accuracy otherwise afforded by a computerized system.

From the perspective of CBA, the fine as computed and imposed is unfair, repressive and punitive. It goes far beyond anything resembling a civil contempt sanction. It is essentially a criminal contempt sanction which was applied without according the Bank the procedural due process to which it is entitled. This Court should intervene and remedy the situation.

CONCLUSION

The petition for certiorari should be granted and, upon review, the decisions of the court of appeals and the district court should be reversed.

Dated: September 28, 1984

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jerry Strochlic, a member of the Bar of this Court, certify that three copies of the annexed Brief *Amicus Curiae* of The Canadian Bankers' Association, have been served this 28th day of September, 1984, upon the following counsel:

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